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# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

**RAY HOMESLEY, JAMES A. WAGNER, W. A. LOUDERMILK, JERRY D. ROE AND ROBERT J. FARRELL,**

*Petitioners,*

**V.**

**JANICE H. FAULKNER, *et al.*,**

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITIONERS' REPLY BRIEF

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# PETITIONERS' REPLY BRIEF

Respondents in their Brief in Opposition[1] to Petitioners' Petition for Writ of *Certiorari* anoint B.W. Thomas the sole judge and jury of these Petitioners' claims for refunds of illegally collected state taxes. There is no law in North Carolina which allows them to do so. There is no law enacted by the United States Congress which allows them to do so. These Petitioners are not aware of any constitutional provision or principle which authorizes such an after the fact ad hoc administrative designation of an employee of an interested party to determine

[1] Cited throughout as Opp. Br. at ____.

both the facts and the law and to adjudicate claims of unconstitutional taxation. Yet, employing the "administrative dalliance" rule articulated by the circuit court below, Respondents seek to have these Petitioners' claims adjudicated in just such a suspect manner. Furthermore, to add insult to injury, Respondents blatantly claim that this approach complies with due process.

Respondents admit that they have not made refunds to two of these Petitioners and do not intend to make such refunds. These two Petitioners have never been heard and have never had the opportunity to be heard on their claims. An administrative determination has been made based upon facts and law as B.W. Thomas has determined them to be. Neither these two Petitioners, nor unnamed similarly situated class members, have ever had an opportunity to challenge Mr. Thomas' view of the facts before an impartial decisionmaker even though N.C. Gen. Stat. § 105-267 purports to give them access to the courts in order to do so.

Further, neither these two Petitioners, nor unnamed similarly situated class members, have ever had an opportunity to address B.W. Thomas' view of the law applicable to and his interpretation of N.C. Gen. Stat. § 105-267. For example, this statute can be interpreted as requiring payment of refunds so long as a demand is made within 30 days following the tax due date (normally April 15th) or the date of actual payment whichever is later.[2] No court in North Carolina has ever

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[2] Petitioners contend that the only interpretation of Section 105-267 consistent with Respondents' practices with regard to income taxes and Section 105-267 is to treat all payments before the tax due date as credits on account to be used for payment of taxes once they become due (once accessed or charged). Mr. Thomas has arbitrarily chosen to treat monies received prior to January 15 as "credits" and monies received after January 15 as "payments".

addressed this issue with regard to Section 105-267 and these Petitioners have been denied all opportunity to present their argument on this legal point for decision even though a ruling in their favor would result in tax refunds to them regardless of whether the facts as stated in the Affidavits of these Petitioners are taken as true or the facts as stated in B.W. Thomas' Affidavit of September 29, 1995 are taken as true.

Respondents do not claim that these two Petitioners, nor unnamed similarly situated class members, received any meaningful relief for the unconstitutional taking of taxes from them. Therefore, the due process violation visited upon these two Petitioners and all unnamed similarly situated class members is clear. They had no meaningful opportunity to be heard and they received no meaningful relief for unconstitutional taxation. These are the touchstones of any due process analysis. *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

As for the other three named Petitioners, for years after these three Petitioners filed suit and submitted affidavits as to their compliance with requirements of Section 105-267, Respondents failed to provide refunds. Then on the eve of oral argument in the Fourth Circuit, Respondents provided refund checks to two of these Petitioners without seeking any court approval of their effort to unilaterally resolve the claims of these two class representatives. Finally, after these Petitioners filed their Petition for Writ of Certiorari, Respondents sent a refund check to the third Petitioner, again without seeking any court approval.[3]

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[3] Obviously, the issues presented by the Petition were not addressed by the North Carolina Supreme Court in *Swanson v. North Carolina ("Swanson III")*, 441 S.E.2d 537 (1994); therefore, neither *res judicata* nor the Full Faith and Credit Act can be argued as barring federal action.

For almost five years the State failed to review or otherwise take appropriate action with respect to class members who complied with Section 105-267 as mandated by state law. To date the only action that the State can in good faith state that it has taken is with respect to the three named Petitioners and then only in response to presentation of a clear due process violation to the circuit court of appeals. The State has taken no action to comply with its duty to properly review and take appropriate action with respect to similarly situated unnamed class members. Nor without an opportunity to be heard will other unnamed similarly situated class members, who have complied with Section 105-267, receive the basic requirements of due process.

In short, Respondents, rather than complying with their statutorily (and constitutionally) imposed duty, have simply attempted to moot this class action by resolving the claims of class representatives. This class action was properly certified by the district court and the fact that the named plaintiffs no longer may have a personal stake in the outcome of the class action does not render the class action moot. *E.g., Franks v. Bowman Transp.. Co., Inc.*, 424 U.S. 747 (1976). Under *Franks*, the only constitutional mootness question is whether " a live controversy [remains] at the time this Court reviews the case." *Franks*, 424 U.S. at 756.

Thus, Respondents' contention that this case is essentially moot (Opp. Br. at 7 n.5) is without support because there remain an unknown number of class members who have been unconstitutionally taxed, who complied with the requirements of Section 105-267, for whom Respondents have not reviewed their tax documentation and have not taken appropriate action, and who have not received a full and adequate hearing as required by due process. By affirming, without acknowledging the rights of these class members or considering the number of similarly situated unnamed class members the circuit court below

has acted upon an incomplete record and most likely has unwittingly deprived Petitioners and similarly situated class members of due process of law.

The circuit court below implicitly acknowledged that Petitioners have supported their claims of compliance with Section 105-267 with specific taxpayer documentation. Nevertheless, that court accepted the notion that almost five years of delay constituted mere administrative dalliance because the State acknowledged the long delay and promised that the claims of the named Petitioners would finally be promptly reviewed. That court probably did not envision that Respondents would dispute some of the five Petitioners' claims. The court also too quickly embraced the notion that only these five had been missed.[4] As a result, the court misapprehended the practicality and gravity of the situation, *viz.* that the State can ignore statutory and constitutional requirements merely because it cannot handle an administrative burden imposed by the General Assembly and when, and only when, a wronged taxpayer (who complied with all the procedural hurdles imposed) goes through the arduous task of suing the State to enforce his rights will the State promise to take some action to review the matter and then, the State compounds the wrong by arbitrarily denying the refund request without providing the taxpayer with a constitutionally mandated opportunity to be

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[4] At a minimum, the court of appeals should have remanded the case to allow the district court to determine the number of similarly situated unnamed class members. To hold as it did--that reviewing and taking action with respect to the named Petitioners removes the case from further consideration under the Due Process Clause--has the impermissible effect of denying all others similarly situated of due process and places them at the mercy of Respondents. This result is particularly onerous since in other litigation Respondents admit they have not attempted to locate all demands for refunds which they may have received. (App. F, p. 83)

heard. Nor should it be forgotten that the named Petitioners represent all unnamed similarly situated class members.

Therefore, despite Respondents' contentions to the contrary, the administrative dalliance rule adopted by the court below is a previously unrecognized exception to the general rule that both individuals and unnamed class members in a class action are entitled by the due process clause of the United States Constitution to both an opportunity to be heard and meaningful relief for unconstitutional deprivations of property of the type which have occurred here. Because these Petitioners believe that this new rule is unsupported by either the constitution or this Court's interpretation of the due process clause (and Respondents cite no authority in support of the rule), Petitioners seek review by this Court of the decision below.

## CONCLUSION

Therefore, and for all of the foregoing reasons, Petitioners respectfully request that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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